



## Early Journal Content on JSTOR, Free to Anyone in the World

This article is one of nearly 500,000 scholarly works digitized and made freely available to everyone in the world by JSTOR.

Known as the Early Journal Content, this set of works include research articles, news, letters, and other writings published in more than 200 of the oldest leading academic journals. The works date from the mid-seventeenth to the early twentieth centuries.

We encourage people to read and share the Early Journal Content openly and to tell others that this resource exists. People may post this content online or redistribute in any way for non-commercial purposes.

Read more about Early Journal Content at <http://about.jstor.org/participate-jstor/individuals/early-journal-content>.

JSTOR is a digital library of academic journals, books, and primary source objects. JSTOR helps people discover, use, and build upon a wide range of content through a powerful research and teaching platform, and preserves this content for future generations. JSTOR is part of ITHAKA, a not-for-profit organization that also includes Ithaka S+R and Portico. For more information about JSTOR, please contact [support@jstor.org](mailto:support@jstor.org).

## MARITIME LAW IN THE WAR WITH SPAIN.

THE decision by the Supreme Court of the United States in May, 1900, of the last pending prize case growing out of the war between the United States and Spain enables us to take a definite and comprehensive view of the rules by which the conduct of the parties to the conflict was governed, particularly with reference to important questions of commercial intercourse and the treatment of merchant ships and other private property at sea. In order, however, to present the subject in its proper relations, it is necessary to make certain observations as to the position of the parties prior to the outbreak of hostilities.

### I. *Situation Prior to the War.*

By international law up to the present time, the ships of an enemy are lawful prize, but their cargoes may or may not be subject to condemnation. On the other hand, ships of a neutral are not in themselves good prize, but may become so as the result of unneutral conduct,—such as the attempt to break a blockade,—and their cargoes, like those of enemy ships, may or may not be subject to confiscation, according to circumstances. As to the treatment of cargo, the following rules have been acted upon :

1. The goods of an enemy may be seized and confiscated, whether found in an enemy or in a neutral ship.

2. Goods of an enemy, contraband of war excepted, are exempt from seizure and confiscation when on board of a neutral ship. This is known as the rule of “free ships, free goods.”

3. The goods partake of the character of the ship : if the ship is neutral, they are free ; if the ship belongs to an enemy, they are condemned. This is known as the rule of “free ships, free goods ; enemy ship, enemy goods.”

As the last rule is enforced only under special treaty stipulations, it does not at the moment concern us. The great contest has been waged between the first and second rules. The first, that the fate of the goods is determined by the belligerent or neutral character of the owner, without regard to whether the ship is enemy or neutral, was at one time the common law of Europe. But about the middle of the seventeenth century a new rule began to be introduced, and it was stipulated in various treaties that the goods of an enemy should be free when on board of a neutral ship. This rule was subsequently embodied in the marine ordinances of France. It was strenuously advocated by the Dutch. It was embraced in the declaration of the Empress of Russia of 1780, which formed the basis of the first Armed Neutrality. Great Britain generally adhered to the old rule, and in the maritime wars of the eighteenth century the new rule was little observed. In time, however, Great Britain came to accept the new rule. When the Crimean War broke out, she joined France in proclaiming that enemy property on board of a neutral ship would be respected. Then, at the close of the war, came the famous Declaration of Paris of April 16, 1856, by which the signatory powers, — France, Great Britain, Russia, Prussia, Austria, Sardinia and the Ottoman Porte, — with a view "to establish a uniform rule on a point so important," announced their adherence to the rule and engaged to invite other powers to adhere to it. The declaration contained in all four rules, which were as follows:

1. Privateering is and remains abolished.
2. The neutral flag covers an enemy's goods, with the exception of contraband of war.
3. Neutral goods, with the exception of contraband of war, are not liable to capture under the enemy's flag.
4. Blockades in order to be binding must be effective, that is to say, maintained by a force sufficient really to prevent access to the coast of the enemy.

These rules, in accordance with the resolution of the Congress of Paris, were brought to the notice of the powers for

acceptance or rejection as a whole, and were accepted by all the German states, by the Two Sicilies and the Papal States and indeed by all the powers, except the United States, Mexico, Spain and Venezuela. The United States, whose objection was based upon the fact that, while privateering was to be abolished, the capture of enemy ships and of enemy property on board such ships was still to be permitted, offered to adhere to the declaration, on condition that it be so amended as to exempt private property at sea altogether from capture, save in the case of contraband or of blockade. This offer, which was made in the closing days of the administration of Pierce, was withdrawn by President Buchanan, before any definite action upon it was taken. On the outbreak of the Civil War the United States offered to accept the declaration in its entirety; but this offer came to naught, since it was found to involve the recognition of the right of the United States to bind the Confederacy, which had authorized the issuance of privateering commissions.

As the United States had not become a party to the Declaration of Paris, it is important to ascertain what was its actual position with respect to the rules therein laid down, prior to the war with Spain. As to the first and fourth rules, this question may readily be answered. The rule that blockades in order to be binding must be effective, had always been maintained by the United States as a principle of international law. On the other hand, the United States, while seeking on various occasions to establish the exemption of private property at sea from capture, had maintained the right, so long as such an exemption was not established, to employ privateers, although during the Civil War the government issued no commissions for that purpose. But, as to the second and third rules, the position of the United States has often been imperfectly apprehended. The rule that neutral goods, with the exception of contraband of war, are not liable to capture under the enemy's flag, has always been acted upon by the United States, save in case of special treaty stipulations to the contrary; but with the rule that free ships make free goods the case is different.

Mr. Seward, referring to this rule, as embodied in the Declaration of Paris, once said : " We have always practiced on the principles of the declaration." <sup>1</sup> Similar expressions may be found in the works of publicists, but they are hardly accurate. Our courts, except where a treaty prescribed a different rule, had uniformly confiscated enemy property, even when it was seized under a neutral flag. And what is to be said as to the treaties? In only ten of them, made with seven powers,—Algiers, 1816; Morocco, 1787 and 1836; Prussia, 1785 and 1828; Spain, 1795; Tripoli, 1796 and 1805; Tunis, 1797, and Venezuela, 1860,—had the rule of " free ships, free goods " been stipulated for unconditionally, contraband always excepted. Of these the treaties with Algiers and Venezuela had come to an end, and the treaty with Spain had been modified. In six treaties—Russia, 1854; Two Sicilies, 1855; Peru, 1856; Bolivia, 1858; Hayti, 1864, and the Dominican Republic, 1867—the principle of " free ships, free goods " was recognized as " permanent and immutable," but the contracting parties engaged to apply it only to the commerce and navigation of such powers as should " consent to adopt " it as " permanent and immutable." Of these treaties those with the Dominican Republic and the Two Sicilies had ceased to be in force, and that with Peru had been superseded. In our treaty with Spain of 1819 the principle of " free ships, free goods " was acknowledged, but only in regard to the property of enemies whose governments recognized it. Similar stipulations may be found in our treaties with Italy of 1871 and Peru of 1887, and indeed in the first treaty ever concluded by the United States—the treaty of amity and commerce with France of February 6, 1778. But in the treaty with France they were coupled with yet another stipulation restrictive of neutral commerce—namely, that the goods of the citizens of the contracting parties should be confiscated, if laden on the ship of an enemy, unless they were shipped before the declaration of war or within a certain time afterwards in ignorance of the declaration. These associated stipulations are found more generally than any others in our treaties relating to neutral rights, as

<sup>1</sup> Instruction to Mr. Dayton, Minister to France, September 10, 1861.

may be seen by the following list: Brazil, 1828; Central America, 1825; Chile, 1832; Colombia, 1824 and 1846; Ecuador, 1839; France, 1800; Guatemala, 1849; Mexico, 1831; the Netherlands, 1782; Peru, 1851; Peru-Bolivia, 1836; Salvador, 1850 and 1870; Sweden and Norway, 1783, 1816 and 1827, and Venezuela, 1836. But at the outbreak of the war with Spain all these treaties, except those with Colombia (1846), Salvador (1870) and Sweden and Norway (1827), had ceased to be in force. With Great Britain we had had no engagement on the subject, except that embodied in the treaty of 1794, which acknowledged the rule of the common law.

Such was the situation on the eve of the war with Spain.

## II. *Subsequent Declarations as to Maritime Law.*

April 20, 1898, the President approved a joint resolution of Congress, by which it was declared (1) that "the people of Cuba are, and of right ought to be, free and independent"; (2) that it was the duty of the United States to demand, and that the United States did thereby demand, that Spain at once relinquish her authority and government in Cuba and withdraw her land and naval forces from the island and its waters; (3) that the President was directed and empowered to use the land and naval forces of the United States and to call into actual service the militia, to such extent as might be necessary to carry these resolutions into effect; and (4) that the United States disclaimed any disposition or intention to exercise sovereignty, jurisdiction or control over the island except for the pacification thereof, and asserted its determination, when that was accomplished, to leave the government and control of the island to its people.

On the same day the Spanish minister at Washington asked for and obtained his passports, and the text of the joint resolution was cabled by the United States to its minister in Madrid for communication to the Spanish government. But, before it could be so communicated, the American minister, on April 21, received from the Spanish government a note in which it was

stated that the joint resolution was considered as an obvious declaration of war and that all diplomatic relations consequently were severed. On April 22 the President issued a proclamation, in which, referring to the joint resolution of Congress, he declared a blockade of ports on the north coast of Cuba from Cardenas to Bahia Honda and of the port of Cienfuegos on the south coast. The blockade was instituted on the same day.

On April 22 the Department of State, in a telegraphic instruction to the diplomatic representatives of the United States, said: "In the event of hostilities between the United States and Spain, the policy of this government will be not to resort to privateering, but to adhere to the following recognized rules of international law." The telegram then recited the second, third and fourth rules of the Declaration of Paris.

April 25, 1898, war was by act of Congress declared to have existed since the 21st, and on April 26 the President issued a proclamation defining the position of the government on questions of maritime law. By this proclamation the announcement that it would not be the policy of the United States to resort to privateering was repeated; and, following this announcement, six rules were promulgated for the observance of officers of the United States during the conflict. These rules, the first three of which embodied the substance of the second, third and fourth rules of the Declaration of Paris, were as follows:

1. The neutral flag covers enemy's goods, with the exception of contraband of war.
2. Neutral goods, not contraband of war, are not liable to confiscation under the enemy's flag.
3. Blockades in order to be binding must be effective.
4. Spanish merchant vessels, in any ports or places within the United States, shall be allowed till May 21, 1898, inclusive, for loading their cargoes and departing from such ports or places; and such Spanish merchant vessels, if met at sea by any United States ship, shall be permitted to continue their voyage, if, on examination of their papers, it shall appear that their cargoes were taken on board before the expiration of the above term; Provided, that nothing

herein contained shall apply to Spanish vessels having on board any officer in the military or naval service of the enemy, or any coal (except such as may be necessary for their voyage), or any other article prohibited or contraband of war, or any despatch of or to the Spanish government.

5. Any Spanish merchant vessel which, prior to April 21, 1898, shall have sailed from any foreign port bound for any port or place in the United States, shall be permitted to enter such port or place, and to discharge her cargo, and afterward forthwith to depart without molestation; and any such vessel, if met at sea by any United States ship, shall be permitted to continue her voyage to any port not blockaded.

6. The right of search is to be exercised with strict regard for the rights of neutrals, and the voyages of mail steamers are not to be interfered with except on the clearest grounds of suspicion of a violation of law in respect of contraband or blockade.

The rules to be observed by the Spanish government were embodied in a royal decree of April 23, 1898. This decree allowed only five days from the date of its publication for the departure of American ships from Spanish ports. It did not in terms prohibit the capture of such ships after their departure, nor did it provide for the entrance and discharge of American ships sailing for Spanish ports before the war. It declared the adhesion of Spain to the second, third and fourth rules of the Declaration of Paris, but reserved the right to issue letters of marque to privateers. Of this reservation Spain afterwards took no advantage. The decree also declared that the government would, for the purposes of cruising, organize a service of "auxiliary cruisers of the navy" composed of "ships of the Spanish mercantile navy" and "subject to the statutes and jurisdiction of the navy." The United States organized a similar service, under the actual command of officers of the navy.<sup>1</sup>

<sup>1</sup> The conditions under which this service was organized are set forth in the case of *The Rita*, 89 Fed. Rep. 763, relating to the distribution of prize money among the officers and crew of the auxiliary cruiser *Yale*, formerly the steamer *City of Paris* of the International Navigation Company. By the act of March 3, 1899, for the reorganization of the U. S. Navy and Marine Corps, all provisions of law authorizing the distribution among captors of prize money or providing for the payment of bounty are repealed. — 30 U. S. Statutes at Large, 1004, 1007.

As no captures were made by Spain, no opportunity arose for the judicial construction of the rules which that government announced for its guidance. In respect of some of the captures made by the United States, there arose interesting questions which became the subject of judicial decision.

### III. *Vessels in Port before or after the Outbreak of the War.*

In the case of the *Buena Ventura* an important application was made of rule four of the proclamation of April 26. The *Buena Ventura* was a Spanish merchant steamship, which was captured by the United States steamship *Nashville*, eight or nine miles off the Florida coast. On the 27th of May she was condemned by the United States District Court for the Southern District of Florida as enemy property.<sup>1</sup> This sentence was reversed by the Supreme Court of the United States.<sup>2</sup> It appeared that the *Buena Ventura* was, at the time of her capture, on a voyage from Ship Island, in the State of Mississippi, to Rotterdam, by way of Norfolk, Virginia, with a cargo of lumber. She arrived at Ship Island March 31, 1898, and sailed for Rotterdam on April 19, with a permit, obtained in accordance with the laws of the United States, to call at Norfolk for a supply of bunker coal. She was captured on the morning of April 22. She made no resistance, had on board no military or naval officer, and carried no arms or munitions of war. It was undisputed that when captured she was on her way to Norfolk, and that her papers for that purpose were in due form. The opinion of the Supreme Court was delivered by Mr. Justice Peckham. The question at issue was whether she could be brought within the exemption of the fourth rule of the proclamation of April 26 as to "Spanish merchant vessels, in any ports or places within the United States." In the course of his opinion Mr. Justice Peckham observed that the vessel in question, as a merchant vessel of the enemy carrying on an

<sup>1</sup> *Buena Ventura et al.*, 87 Fed. Rep. 927. The cargo, being the property of neutrals and not contraband of war, was restored.

<sup>2</sup> The *Buena Ventura*, 175 U. S. 384.

innocent commercial enterprise at or just prior to the time when hostilities began, belonged to a class which the United States had always desired to treat with great liberality, and which civilized nations had in their later practice in fact so treated. The President's proclamation should therefore receive "the most liberal and extensive interpretation" of which it was capable, and, where two or more interpretations were possible, the one most favorable to the belligerent in favor of whom the proclamation was issued. The provision that "Spanish merchant vessels in any ports or places within the United States shall be allowed until May 21, 1898, inclusive, for loading their cargoes and departing," might, said the learned justice, be held to include (1) only vessels in port on the day when the proclamation was issued, namely, April 26, or (2) those in port on April 21, the day on which war was declared by Congress to have begun, or (3) not only those then in port, but also any that had sailed therefrom on or before May 21, whether before or after the commencement of the war or the issuing of the proclamation. The court adopted the last interpretation. While the proclamation did not in so many words include vessels which had sailed from the United States before the commencement of the war, such vessels were, said Mr. Justice Peckham, clearly within its "intention," under the liberal construction which the court felt bound to give to it. In view of the fact, however, that, at the time of the capture, the proclamation of April 26, without which the vessel would have been liable to condemnation, had not been issued, restitution was awarded without damages or costs.<sup>1</sup>

The effect of the fourth rule of the proclamation of April 26 was again considered in the case of the Spanish steamship *Panama*. This vessel was condemned by the court of original jurisdiction as enemy property,<sup>2</sup> and the decree was confirmed by the Supreme Court.<sup>3</sup> The *Panama*, a steamship of 1432 tons register, owned by the Compania Transatlantica, a Spanish

<sup>1</sup> The Chief Justice and Justices Gray and McKenna dissented from the decision of the court.

<sup>3</sup> The *Panama*, 176 U. S. 535.

<sup>2</sup> *Buena Ventura et al.*, 87 Fed. Rep. 927.

corporation of Barcelona, Spain, and carrying the Spanish flag, sailed from New York on April 20, 1898, for Havana, Cuba, and certain Mexican ports, with a general cargo and passengers and mails. April 25, when about twenty-five miles from Havana, she was captured by a United States man-of-war. The *Panama* had a commission as a royal mail ship from the Spanish government and a crew of seventy-one men, who had been shipped at various times at Havana; and she carried twenty-nine passengers, all of whom, with the exception of one Frenchman, were Spaniards. Mr. Justice Gray, who delivered the opinion of the Supreme Court, said that the case of the *Buena Ventura* would be decisive of that of the *Panama*, but for the mails and the arms carried by the latter vessel and the contract under which she sailed. Under that contract, which was entered into in 1886, the Spanish government had the right to take possession of the steamer in case of war; and it was required that the ships belonging to the line should be specially adapted to use in war, and that every mail steamer should carry a certain armament "for her own defense." The officers and crew, and so far as possible the engineers, were to be Spaniards. When captured the *Panama* carried two breech-loading Hontoria guns of nine centimeter bore, one mounted on each side of the ship; one Maxim rapid-fire gun on the bridge; twenty Remington and ten Mauser rifles, with ammunition for all the guns and rifles; and thirty or forty cutlasses. The guns had been put on board three years before, and the small arms and ammunition a year or more; and all her armament was carried in compliance with the mail contract, except the Maxim gun and the Mauser rifles. It might be assumed, said the court, that the primary object of the steamer's armament, and in time of peace its only object, was that of defense. The armament, however, was not in itself inconsiderable, and after the capture of the vessel her arms and ammunition were delivered over for the use of the United States navy. The ship was therefore enemy property, bound to an enemy port, carrying an armament susceptible of use for hostile purposes, and herself liable, on arriving in that port, to be appropriated by the enemy for

such purposes. The intent of the proclamation, continued the court, was to exempt for a time from capture peaceful commercial vessels, and not to assist the enemy in obtaining weapons of war; and it could not be reasonably construed as exempting from capture

a Spanish vessel owned by a subject of the enemy; having an armament fit for hostile use; intended, in the event of war, to be used as a war vessel; destined to a port of the enemy; and liable, on arriving there, to be taken possession of by the enemy, and employed as an auxiliary cruiser in the enemy's navy.

#### IV. *Vessels Sailing for an Enemy Port before the War.*

The proper application of the fifth rule of the proclamation of April 26 was considered by the Supreme Court in the case of the Spanish merchant steamer *Pedro*,<sup>1</sup> which was condemned by the court below as enemy property.<sup>2</sup> The *Pedro*, which was a British-built ship and for several years sailed under a British registry, was transferred in 1887 to a Spanish corporation of Bilbao, Spain, and was duly registered as a Spanish vessel. Thereafter she sailed under the Spanish flag and was officered and manned by Spaniards, though she was employed for the transportation of merchandise for hire under the management of a Liverpool firm. Her usual course was to take cargo in Europe for Cuban ports and, after discharging there, to proceed to the United States and obtain cargo for Europe, the round trip occupying about three months. On March 18, 1898, while she was loading in Antwerp for Cuba, she was chartered by an American firm to proceed to Pensacola, Florida, or Ship Island, Mississippi, for a cargo of lumber for Rotterdam or Antwerp. Soon afterwards she left Antwerp with about two thousand tons of merchandise of various kinds for Havana and Cienfuegos. She arrived at Havana on April 17 and, after discharging most of her cargo, sailed on the 22d for Santiago,

<sup>1</sup> *The Pedro*, 175 U. S. 354. The case of the *Guido*, 175 U. S. 382, is similar, and was decided on the strength of that of the *Pedro*, without an extended opinion.

<sup>2</sup> *Buena Ventura et al.*, 87 Fed. Rep. 927.

Cuba, with a small quantity of general merchandise taken at Havana. On the same day she was captured a few miles off Havana by a cruiser of the United States blockading fleet. Her condemnation was resisted on the ground, among others, that her true destination was a port in the United States, so that she fell within the exemption contained in rule five. The court, Chief Justice Fuller delivering the opinion, declined so to hold. The Chief Justice observed that the *Pedro* remained at Havana from the 17th of April to the 22d, and left on the latter day, which was the day after the war began; that she then had no cargo for any port in the United States, but only for Santiago and Cienfuegos, in Cuba. She had not left a foreign port in ignorance of the "perilous condition of affairs," but must be assumed to have been advised of the imminency of hostilities; nor was she bringing a cargo to the United States, for the increase of its resources and the convenience of its citizens. On the contrary, she was captured while trading from one enemy port to another, being herself an enemy vessel. Under these circumstances, the fact that she was under contract ultimately to proceed to a port of the United States to take cargo for Europe did not, said the Chief Justice, bring her within the exemption of the fifth rule; and he declared that the doctrine of continuous voyages, as laid down by the court on various occasions, did not apply to the case.<sup>1</sup> The decree of condemnation was therefore affirmed.

Mr. Justice White delivered a strong dissenting opinion, in which Justices Brewer, Shiras and Peckham concurred. In this opinion it was argued that the principal voyage of the vessel was from Antwerp to the United States, the calling at Cuban ports being merely incidental; that, although Congress afterwards declared that war should be considered as having existed on and after April 21, it was neither conceived nor known, when she left Havana on the 22d, that a state of war existed; that, just before her departure from Havana, one

<sup>1</sup> The Chief Justice discussed and distinguished the following cases: *The Circassian*, 2 Wall. 135; *The Bermuda*, 3 Wall. 514; *The Springbok*, 5 Wall. 1; *The Joseph*, 8 Cranch, 251; *The Argo*, Spinks's Prize Cases, 53.

American ship was allowed to sail from that port and, shortly after her departure, another; and that the reference to the fact that the *Pedro* had no cargo for the United States ignored the enlightened moral purpose of the proclamation, and particularly the provisions of the fourth rule, which allowed enemy ships not only to depart from the United States but also to load and take away cargo either for a neutral port or for a port of the enemy not blockaded.<sup>1</sup>

### V. *Questions of Enemy Ownership.*

In three well-considered cases, two of which related to vessels and the third to cargo, question was raised as to whether the captured property, whose condemnation was demanded as enemy property, legally bore that character. The first case was that of the *Pedro*,<sup>2</sup> to which I have already adverted. After the preparatory proofs were taken, the master, appearing on behalf of the owners, made a claim to the vessel and moved for leave to take further proof, on the ground that, although a majority of the stock of the Spanish corporation, to which the vessel ostensibly belonged, was registered in the names of Spanish subjects and only a minority in the names of British subjects, one of the latter had possession of all the certificates of stock, in consequence of which he was, under the charter of the company, the sole beneficial owner of the steamer; that the transfer from British to Spanish registry was made solely with a view to facilitate her engaging in commerce with the Spanish colonies; that it was the intention of the British stockholders to restore her to the British registry and flag, whenever the trade might be disturbed; and that the steamer was insured by British underwriters, by whom, if she should be condemned, the loss would be borne. The court below refused to allow further proofs to be taken, and this ruling was affirmed

<sup>1</sup> Mr. Justice White also contended that the decision in the *Argo*, Spinks's Prize Cases, 53, was a decision *in consimili casu*, and should be treated as an authority for the restoration of the *Pedro*.

<sup>2</sup> 175 U. S. 354; *supra*, p. 409.

by the Supreme Court. The vessel, said the Supreme Court, belonged to a Spanish corporation, had a Spanish registry, was sailing under the Spanish flag and a Spanish license, and was officered and manned by Spaniards. Nothing was better settled than that she must, under such circumstances, be deemed a Spanish ship and treated accordingly.<sup>1</sup> When the stockholders elected to take the benefit of the Spanish navigation laws, they must be held also to have elected to rely on the protection of the Spanish flag. The alleged intention to restore the vessel to British registry, if war should render the change desirable, could not be regarded, since it had not been carried into effect when she was captured. The Spanish ownership having been made out, the facts that the stock of the corporation belonged, legally or equitably, to British subjects, and that the loss would eventually be borne by British underwriters, were, said the court in conclusion, immaterial.

In the case of the *Benito Estenger*,<sup>2</sup> a question was raised as to the validity of the transfer of a vessel from a Spanish subject to a neutral during the war. The *Benito Estenger* was captured by the United States steamship *Hornet*, June 27, 1898, off Cape Cruz, on the south side of the Island of Cuba. December 7, 1898, she was condemned by the United States District Court for the Southern District of Florida as enemy property. The claimant appealed on the ground (1) that she was a British merchant ship, duly documented and entitled to the protection of the British flag, and lawfully owned and registered by a subject domiciled in Great Britain, and (2) that she was engaged in a voyage in behalf of the local Cuban Junta in Kingston, Jamaica, allies of the United States, and was thus captured in the service of the United States, in the performance of friendly offices to the United States forces.

It appeared that prior to June 9, 1898, the vessel was the property of Enrique de Messa, a Spanish subject resident in Cuba, and on that day a bill of sale was made by de Messa to the

<sup>1</sup> Citing *Story*, Prize Courts (Pratt's Ed.) 60, 66; *The Friendschaft*, 4 Wheat. 105; *The Ariadne*, 2 Wheat. 143; *The Cheshire*, 3 Wall. 231; Hall, Int. Law, § 169.

<sup>2</sup> 176 U. S. 568.

claimant, Beattie, a British subject, and the vessel was registered as a British vessel, at Kingston, in accordance with the requirements of British law. She had been engaged in trade with the Island of Cuba, and more particularly between the ports of Kingston and Montego, Jamaica, and the port of Manzanillo, Cuba. She left Kingston June 23, and proceeded with a cargo of flour, rice, corn meal and coffee to Manzanillo, where the cargo was discharged. She cleared from Manzanillo, on June 27, for Montego and then for Kingston, and was captured on the same day off Cape Cruz.

The opinion of the court, which was delivered by Chief Justice Fuller, contains various observations on the enemy character, illegal intercourse with the enemy, blockade and other matters; but it may be said that the only real questions in the case were (1) whether de Messa, though a Spanish subject, was to be treated as an enemy, and (2) whether the transfer of the ship from him to Beattie was an actual transfer made in good faith.

As to the first point, there was, said the court, "evidence tending to show that Messa sympathized with the Cuban insurgents, but no proof that he was himself a Cuban rebel or that he had renounced his allegiance to Spain." The cargo of the vessel when captured consisted chiefly of flour, and there was evidence to show that this flour, when landed at Manzanillo, was immediately transferred to the Spanish government warehouse. The court referred to Manzanillo as a "Spanish stronghold," and observed that the delivery of the provisions to the Spanish government constituted, under the laws of war, illicit intercourse with the enemy. It was alleged, however, that de Messa had rendered important service to the United States, that he was the friend and not the enemy of the United States, and that there was an agreement between him and the United States consul which operated to protect the vessel from capture. It appeared that de Messa had endeavored to cultivate friendly relations with the United States consul at Kingston and had given him an old government plan of the province of Santiago and an especially prepared chart of the harbor, in

return for which he endeavored to obtain from the consul a letter of protection for the voyage which he was about to undertake. The consul declined to furnish the letter, but on June 23 wrote to Admiral Sampson that de Messa offered to give certain information that might be valuable and proposed to be off Cape Cruz on June 30, adding: "You quite understand that in dealing with those people, one is always more or less liable to imposition. I therefore make no recommendation of Messa to you." The claimant asserted, while the consul denied, that protection was given to the voyage by this letter. With reference to this contention, the court said that there was nothing to show that the voyage was undertaken on the strength of the letter, or that it in any way contributed to the capture; nor that the admiral intended to avail himself of the suggestion made in it; "but," said the court,

we do not go at length into this matter, because we think that no engagement with the United States nor any particular service to the United States was made out in that connection, and so far as appears the vessel was captured in the ordinary course of cruising duty at a time and under circumstances when her liability was not to be denied. Moreover, a United States consul has no authority by virtue of his official station to grant any license or permit the exemption of a vessel of an enemy from capture and confiscation.<sup>1</sup>

Referring to the same subject in another place, the court said:

Messa's status was that of an enemy, as already stated, and this must be held to be so notwithstanding individual acts of friendship, certainly since there was no open adherence to the Cuban cause, and allegiance could have been shifted with the accidents of war.

As to the question of the validity of the sale, the court said that de Messa's story of the transfer was that he was compelled to sell the steamer in order to get money to live on, and that he made the sale for \$40,000, for the whole or a large part of which credit was given on an indebtedness to the firm of which

<sup>1</sup> The court cited and discussed *Rogers vs. The Amado*, Newberry, 400; *The Hope*, 1 Dodson, 226, 229; *The Joseph*, 8 Cranch, 451; *Les Cinq Frères*, 4 Lebau's Nouveau Code de Prises, 63; *The Maria*, 6 C. Rob. 201.

Beattie was a member, and that he was employed by Beattie to go on the vessel as his representative and business manager. Beattie in his testimony said that the sale was *bona fide*, but declined to state of what the payment of the purchase money consisted. The consul of the United States at Kingston testified that Beattie, in conversation, while insisting that the transfer was absolute, admitted that it was effected for the purpose of protecting the vessel. Apparently no money passed. The Spanish master and crew remained in charge. De Messa went on the voyage as supercargo; and in the brief of the claimant's counsel it was declared that the transfer was obviously made to protect the steamer as neutral property from Spanish seizure, while it was admitted that de Messa "still retained a beneficial interest after this sale and transfer of flags." On this statement of facts the court observed that "transfers of vessels *flagrante bello* were originally held invalid," but that the rule had been "modified." The court quoted from Hall's *International Law*, 4th edition, page 525, as containing the correct rule of law, the following passage:

In England and the United States, on the contrary, the right to purchase vessels is in principle admitted, they being in themselves legitimate objects of trade as fully as any other kind of merchandise, but the opportunities of fraud being great, the circumstances attending a sale are severely scrutinized, and the transfer is not held to be good if it is subjected to any condition or even tacit understanding by which the vendor keeps an interest in the vessel or its profits, a control over it, a power of revocation, or a right to its restoration at the conclusion of the war.<sup>1</sup>

The burden of proof, said the court, was on the claimant. In conclusion, the court held that the requirements of the law of prize were not satisfied by the proofs in question, and that the condemnation was proper.<sup>2</sup>

<sup>1</sup> The court also cited Story's Notes on the Principle and Practice of Prize Courts (Pratt's ed.), 63; 2 Wheat. App. 30; *The Sechs Geschwistern*, 4 C. Rob. 100; *The Jemmy*, 4 C. Rob. 31; *The Omnibus*, 6 C. Rob. 71; *The Island Belle*, 13 Fed. Cases, 168; *The Baltica*, Spinks's Prize Cases, 264; *The Soglasie*, Spinks's Prize Cases, 104; *The Ernst Merck*, Spinks's Prize Cases, 98.

<sup>2</sup> Justices Shiras, White and Peckham dissented.

In the case of the *Carlos F. Roses*, in which the condemnation of the cargo was demanded as enemy property, a question was raised as to the effect of the endorsement of the bills of lading to neutrals. The vessel itself, a Spanish bark, was condemned as enemy property. The cargo was claimed by Kleinwort Sons & Co., British merchants, of London. It consisted of jerked beef and garlic, and was shipped at Montevideo in March, 1898, by Gibernau & Co., merchants of that place but citizens of the Argentine Republic. The invoices stated that the goods were shipped "to order for account and risk and by order of the parties noted below." In the invoice of jerked beef, the consignees noted below were "the expedition or voyage of the *Carlos F. Roses*" and "Mr. Pedro Pagés of Havana," all Spanish subjects; the consignees of the garlic were "Mr. Pedro Pagés" and "the undersigned," Gibernau & Co. There were three sets of bills of lading issued by the master to Gibernau & Co., — one for that part of the shipment of jerked beef made for account of the vessel, another for that part made for account of Pagés, and the third for the shipment of garlic for the joint account of Pagés and Gibernau & Co. All the bills set forth that the goods were taken for the account and at the risk of whom it might concern. In the ship's manifest the destination of the cargo was stated thus: "Shipped by Pla Gibernau Co. To order." The *visé* of the Spanish consul read: "Good for Havana, with a cargo of jerked beef and garlic." There was no charter party. On the face of the papers the court held that the goods, when delivered to the vessel, became the property of the consignees named in the invoices, and that, as Gibernau & Co. had not appeared and claimed any interest, the whole cargo, which the claimants in fact admitted to be "ultimately destined for Don Pedro Pagés of Havana," must be condemned as enemy property, unless cause to the contrary was shown. Such cause Kleinwort & Co. endeavored to establish, on the ground that, after the shipment of the cargo, they made advances upon it to the amount of about \$30,000, in consideration of which the bills of lading, endorsed in blank by Gibernau & Co., were delivered to them,

with the intent that they should take title to the bills and the cargo, and, on the arrival of the latter at its destination, hold it as security, with the right to dispose of it and reimburse themselves with the proceeds. They contended that in this way they became the lawful owners both of the bills and of the cargo. It appeared, however, that in neither of the two bills of exchange, which were drawn on Kleinwort & Co. for the amount of the advances, was any reference made to the cargo, and that, while two of the bills of lading were alleged to have been delivered to the firm at the time of its acceptance of the bills of exchange, the third, for the greater part of the jerked beef, was not delivered till long afterwards. On these and other circumstances, the court held that the cargo never *bona fide* passed to Kleinwort & Co., but remained the property of Spanish subject, and was liable to condemnation.<sup>1</sup>

## VI. *Case of the Fishing Smacks.*

But the most important opinion delivered by the Supreme Court on the question of the liability of enemy property to condemnation was that in the case of the Spanish fishing smacks, the *Paquete Habana* and the *Lola*.<sup>2</sup> The particular point decided was that "coast-fishing vessels, with their implements and supplies, cargoes and crews, unarmed and honestly pursuing their peaceful calling of catching and bringing in fresh fish, are exempt from capture as prize of war." In reaching this conclusion, however, the court, through Mr. Justice Gray, who delivered the opinion, announced and applied a principle which, though often recognized by publicists, has perhaps never before been so clearly and precisely enunciated by a judicial tribunal—that is, the principle of the progressive development of international law. Referring to a decision of Lord Stowell, in which it was said that the exemption of vessels, such as those in question, was "a rule of comity only, and not of legal decision," Mr. Justice Gray said :

<sup>1</sup> Mr. Justice Shiras delivered a dissenting opinion, in which Mr. Justice Brewer concurred.

<sup>2</sup> The *Paquete Habana*, 175 U. S. 677.

The word "comity" was apparently used by Lord Stowell as synonymous with courtesy or good will. But the period of a hundred years which has since elapsed is amply sufficient to have enabled what originally may have rested in custom or comity, courtesy or concession, to grow, by the general assent of civilized nations, into a settled rule of international law. As well said by Sir James Macintosh: "In the present century a slow and silent, but very substantial mitigation has taken place in the practice of war; and in proportion as that mitigated practice has received the sanction of time, it is raised from the rank of mere usage, and becomes part of the law of nations."—*Discourse on the Law of Nations*, 38; 1 *Miscellaneous Works*, 360.

It may be hoped that this enlightened declaration will lead our courts to abandon the repetition of the unfortunate *dicta* of *Brown vs. United States*,<sup>1</sup> based upon the theory that it was the peculiar prerogative of a remote age to fix by its customs, however rude and barbarous they may have been, an immutable law, in comparison with which the customs of modern times are merely "comity" or "courtesy," which may be discarded at will.

#### VII. *Questions of Blockade.*

The first hostile act of the United States, on the outbreak of war, was the blockade of the ports of the north coast of Cuba from Cardenas to Bahia Honda, inclusive, and of the port of Cienfuegos on the south coast. Subsequently, a governmental blockade was proclaimed of all the ports on the south coast of the island from Cape Frances to Cape Cruz, inclusive, and of the port of San Juan, Porto Rico. Various blockades *de facto* were also maintained. The object of a blockade being to cut off all intercourse between the inhabitants of the blockaded place and the world outside, it is a general rule that while a period is allowed — usually of fifteen days — during which vessels may depart either in ballast, or with cargo bought and shipped before the commencement of the blockade, no cargo is permitted to be shipped after the blockade is instituted. In the first proclamation of blockade by the United

<sup>1</sup> 8 Cranch, 110.

States, which was issued April 22, a period of thirty days was allowed for the departure of neutral vessels from the blockaded ports, but nothing was said as to the cargo. The natural inference would therefore have been that no cargo could be taken on board after the blockade was instituted. But in applying the proclamation to the cases that arose under it, the United States construed it as permitting the taking of cargo during the thirty days; and when the next proclamation was issued, the point was expressly covered by a clause in which it was stated that neutral vessels lying in any of the ports to which the blockade was then extended would be allowed "thirty days to issue therefrom, with cargo." This and other features of the law of blockade were included in General Order No. 592, entitled "Instructions to Blockading Vessels and Cruisers," which was issued by the Navy Department, with the coöperation of the Department of State, on June 20, 1898, for the information and guidance of the naval service.

Three cases involving the law of blockade were adjudicated by the Supreme Court. The first of these was the case of the French steamer *Olinde Rodriguez*,<sup>1</sup> a steamer belonging to the Compagnie Générale Transatlantique. She sailed from Havre June 16, 1898, on her regular voyage, under her mail contract with the French government, for the West Indian ports of St. Thomas, San Juan (Porto Rico), Puerto Plata, Cape Haytian, St. Marque, Port-au-Prince, Gonaives, and return, calling at the same ports. The proclamation declaring San Juan blockaded was issued June 27, 1898. The *Olinde Rodriguez* arrived at St. Thomas July 3, and on July 4 entered the port of San Juan. The United States steamship *Yosemite*, which was lying three miles southwestward of the port, on blockade duty, gave chase, but was unable to reach the steamer before she had turned in and come under the protection of the shore batteries. When on the following morning she came out, the commander of the *Yosemite*, accepting the master's statement that he did not know that the port was blockaded, endorsed on her log an official warning and permitted her to proceed. She duly

<sup>1</sup> 174 U. S. 510.

completed her outward itinerary and had left Puerto Plata on her return voyage when, on July 17, she was captured by the United States steamship *New Orleans* off San Juan, on the charge of attempting to enter that port. Questions were raised (1) as to the existence of the intent to enter and (2) as to the existence of a lawful blockade. The court below doubted the validity of the blockade, because it was maintained by only one cruiser.<sup>1</sup> The Supreme Court observed that the test was whether the blockade was "practically effective"; that this, though a mixed question, was one "more of fact than of law"; that, by General Order No. 492, "a blockade to be effective and binding must be maintained by a force sufficient to render ingress to or egress from the port dangerous"; that, while it was not practicable to define the degree of danger that should constitute a test, it was enough that the danger was "real and apparent"; and that the question of effectiveness was not controlled by the number of the blockading force. The position could not, said the court, be maintained, that one modern cruiser, though sufficient in fact, was not sufficient in law; nor could a vessel, actually captured in attempting to enter a blockaded port, after a warning entered on her log by a cruiser off that port only a few days before, dispute the efficiency of the force to which she was subjected. The blockade was therefore held to be effective and binding. On the other hand, the court decided that the intent to break the blockade was not sufficiently established; but, in view of circumstances of suspicion, ordered that restitution should be awarded without damages, and that the costs and expenses of her custody and preservation, and all costs in the cause except the fees of counsel, should be imposed on the ship.

The British steamship *Newfoundland* was seized off the coast of Cuba July 19, 1898, by a United States cruiser, on a charge of attempt to violate the blockade of Havana. After the preparatory testimony was taken, an order was made for further proof;<sup>2</sup> and on the subsequent hearing the vessel and cargo

<sup>1</sup> The *Olinde Rodriguez*, 89 Fed. Rep. 105; 91 Fed. Rep. 274.

<sup>2</sup> 89 Fed. Rep. 99.

were condemned.<sup>1</sup> This sentence the Supreme Court reversed.<sup>2</sup> The case was one chiefly of fact. It was alleged that the vessel was loitering with intent to seize an opportunity to run into Havana, that her usual lights were not displayed and that she was out of her proper course. These allegations were disputed; and the court was unwilling, upon the mere concurrence of a number of "suspicious circumstances," each one of which "standing alone" could be "explained," to hold that guilt was established. The court below, in discussing the proof of loitering, observed that it fell "very far short" of the inculpatory evidence in the cases of certain sailing vessels, which the government had cited as precedents for condemnation; but suggested that proof less full and precise might be accepted in the case of steam vessels, owing to their superior power of movement. "Undoubtedly there is a difference," said the Supreme Court, "but if steam has increased the power of blockade runners, it has increased in greater degree, when conjoined with the range of modern ordnance, the power of blockade defenders. We recently had occasion to consider their power, and decide that a single modern cruiser might make a blockade effective."<sup>3</sup> It was ordered that the vessel and cargo be restored, but without costs or damages.

June 29, 1898, the steamer *Adula*, 372 tons, belonging to the Atlas Steamship Company, a British corporation, was captured by the United States steamship *Marblehead*, on the charge of an attempt to run the blockade of Guantanamo Bay, in Cuba. She was proceeding at the time under a charter, entered into on the preceding day at Kingston, Jamaica, to one Solis, a Spanish subject, at whose disposal she was placed for the conveyance of passengers from the Cuban ports of Manzanillo, Santiago and Guantanamo to Kingston. Accompanying the charter there was a letter of instructions to the master, signed by the agent of the company at Kingston, by which the master was advised that on his arrival at Guantanamo,

<sup>1</sup> 89 Fed. Rep. 510.

<sup>2</sup> The *Newfoundland*, 176 U. S. 97.

<sup>3</sup> The court here cited the *Olinde Rodriguez*, 174 U. S. 510.

whither he was to proceed direct, he would no doubt find American warships off the port; and he was directed, when signalled, to stop immediately and acquaint the commanding officer with the voyage, in which case, said the instructions, it was not thought that the officer would object to his continuing into port. The steamer was condemned,<sup>1</sup> and the sentence was affirmed by the Supreme Court, Mr. Justice Brown delivering the opinion.<sup>2</sup> The questions involved were (1) the existence of a lawful blockade at Guantanamo, (2) the knowledge of the blockade by those in charge of the vessel and (3) their intent in making the voyage from Kingston. No blockade of Guantanamo was ever proclaimed by the President, the place being east of the line established by the proclamation of June 27. But it appeared that blockades of Santiago and Guantanamo were in fact established by Admiral Sampson early in June, and were maintained till some days after the capture of the *Adula*; and, in view of the operations then being carried on for the purpose of destroying or capturing the Spanish fleet and reducing Santiago, the court thought these blockades must be held to have been lawfully instituted, as an adjunct to such operations. It was contended, however, that, at the time of the capture, the port of Guantanamo was in the possession and control of the United States and that the blockade was thereby terminated. The town of Guantanamo is eighteen miles from the mouth of Guantanamo Bay. The harbor was held by United States naval vessels and by a party of marines who occupied the crest of a hill on the west side of the harbor near its entrance; but the town at the head of the bay was still held by the Spanish forces, as were several other positions near by; and the campaign in the neighborhood was in active progress, and encounters between the American and Spanish troops were of frequent occurrence. Under these circumstances, the court held that "the blockade was still operative as against vessels bound for the city of Guantanamo. The occupation of a city," continued the court, "terminates a blockade because, and only because,

<sup>1</sup> The *Adula*, 89 Fed. Rep. 351.

<sup>2</sup> The *Adula*, 176 U. S. 361.

it supersedes it; and if a vessel be bound to a port or place beyond, which is still occupied by the enemy, the occupation of the mouth of the harbor does not necessarily terminate the blockade as to such places.”<sup>1</sup> The blockade being lawful, the court found, upon the facts, that those in charge of the vessel had actual knowledge of its existence, and that their sailing for the port was unjustifiable and properly subjected the vessel to condemnation.

### VIII. *Contraband.*

The question of contraband did not become the subject of judicial controversy during the war with Spain, but it was dealt with in General Order No. 492. Premising its definition with the explanation that “contraband of war comprehends only articles having a belligerent destination as to an enemy’s port or fleet,” the order specified certain articles as “absolutely contraband” and others as “conditionally contraband.” The former were :

Ordnance ; machine guns and their appliances, and the parts thereof ; armor plate, and whatever pertains to the offensive and defensive armament of naval vessels ; arms and instruments of iron, steel, brass, or copper, or of any other material, such arms and instruments being specially adapted for use in war by land or sea ; torpedoes and their appurtenances ; cases for mines, of whatever material ; engineering and transport materials, such as gun carriages, caissons, cartridge boxes, campaigning forges, canteens, pontoons ; ordnance stores ; portable range finders ; signal flags destined for naval use ; ammunition and explosives of all kinds ; machinery for the manufacture of arms and munitions of war ; saltpeter ; military accouterments and equipments of all sorts ; horses.

The “conditionally contraband” were :

Coal, when destined for a naval station, a port of call, or a ship or ships of the enemy ; materials for the construction of railways or telegraphs, and money, when such materials or money are destined for the enemy’s forces ; provisions, when destined for an enemy’s ship or ships, or for a place that is besieged.

<sup>1</sup> The court cited, as decisive on this point, *The Circassian*, 2 Wall. 135.

By the Spanish royal decree of April 23, 1898, contraband was defined as follows :

Cannons, machine guns, mortars, guns, all kinds of arms and fire-arms, bullets, bombs, grenades, fuses, cartridges, matches, powder, sulphur, saltpeter, dynamite and every kind of explosive, articles of equipment like uniforms, straps, saddles and artillery and cavalry harness, engines for ships and their accessories, shafts, screws, boilers and other articles used in the construction, repair and arming of warships, and in general all warlike instruments, utensils, tools and other articles, and whatever may hereafter be determined to be contraband.

But for the last clause, which seemed to be capable of rendering the preceding specific enumeration nugatory, this paragraph would be open to little objection. Soon after its promulgation the operation of the decree was restricted, on the request of the Italian government, by a special dispensation in favor of sulphur, which is obtained chiefly from Sicily.

#### IX. *Restoration of Commercial Relations.*

By the strict laws of war all trading between enemies is prohibited. On April 27, 1898, the Treasury Department issued to collectors of customs certain instructions, which were prepared in consultation with the Department of State. These instructions forbade the clearance of an American vessel for a Spanish port, but the only restriction they placed upon the clearance of any other vessel for such a port was that the vessel should not carry cargo of contraband of war or of coal. Thus the clearance of a neutral ship with an American-owned cargo for a Spanish port was permitted, and to this extent trading between enemies was allowed.

By the protocol signed at Washington August 12, 1898, provision was made for the immediate suspension of hostilities, as a preliminary to the conclusion of peace. The blockades were immediately raised ; and on August 17, 1898, the Department of State, in response to inquiries made on behalf of the Spanish government, declared (1) that no obstacle would be inter-

posed to the reestablishment of the postal service by Spanish steamers between Spain on the one side and Cuba, Porto Rico and the Philippines on the other; (2) that no objection would be made to the importation of supplies in Spanish bottoms to Cuba and the Philippines, but that it had been decided to reserve the importation of supplies from the United States to Porto Rico to American vessels; and (3) that a Spanish steamer, chartered by French merchants and then lying at Havre, would be permitted to proceed to Philadelphia and to take mineral oil for industrial purposes, provided it was not to be transported to Porto Rico. These answers, it was added, were given with the understanding that American vessels would not for the time being be excluded from Spanish ports, as well as upon the understanding that, if hostilities should at any time be renewed, American vessels that might happen to be in Spanish ports would be allowed thirty days in which to load and depart with non-contraband cargo, and that any American vessel which, prior to the renewal of hostilities, should have sailed for a Spanish port would be permitted to enter such port and discharge her cargo, and afterwards forthwith to depart without molestation, and, if met at sea by a Spanish ship, to continue her voyage to any port not blockaded.<sup>1</sup> These conditions were accepted by the Spanish government,<sup>2</sup> and commercial intercourse was accordingly restored.

J. B. MOORE.

<sup>1</sup> Mr. Moore, Acting Secretary of State, to M. Cambon, French Ambassador.

<sup>2</sup> M. Cambon to Mr. Moore, September 6, 1898.